IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-552

SYLVIA SCOTT WHITLOW . . . . . PETITIONER

V.

F. E. HODGES, DIRECTOR, DIVISION OF DRIVER LICENSING, DEPARTMENT OF TRANSPORTATION OF THE COMMONWEALTH OF KENTUCKY . . . . . RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES M. RINGO
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

GARY L. DAILEY
335 State Office Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

November 19, 1976

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OPINIONS BELOW

The July 23, 1976, opinion of the Court of Appeals for the Sixth Circuit (App. 1-A of Petition), is now reported at 539 F. 2d 582 (1976). The earlier opinions are correctly cited and may be found in Petitioner's Appendix, with which the Respondent agrees and hereby adopts.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 (1), the proper provision for review of a Circuit Court of Appeals judgment in a civil case on certiorari.

Although the question presented by the Petitioner is a proper question for this court to consider, such question has not been decided affirmatively by the Supreme Court of the Commonwealth of Kentucky, and Petitioner's proper remedy appears to be through the avenues of the state courts and from that court to this court. There being no determination as to what the common law of Kentucky is as to this question, Petitioner is premature in raising the constitutional issues as stated in her petition.

Although the Commonwealth does require that a person seek an operator's license in his legal name, no determination by the state's highest court has been made as to what a person's legal name may be. As was stated by Circuit Judge McCree in his dissenting opinion, 539 F. 2d at 584.

> "We cannot determine whether this case is governed by *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd* 405 U.S. 970 (1972), unless we determine whether the common law of Kentucky, like that of Alabama, requires a married woman to adopt her husband's surname."
>
> "(O)ur case can be governed by *Forbush* if and only if Kentucky, like Alabama, clearly requires a married woman to adopt her husband's surname."

at 585:

> "If a majority of the court believe that this is a proper case for abstention, then I think that we should so state forthrightly, and remit plaintiff to the state courts."

However, should this court determine, on the basis of the record herein, that Kentucky common law does, in fact, require that a woman upon marriage must take her husband's surname, the Court does have the appropriate appellate jurisdiction and all parties are properly before this Court, and all jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

WHETHER THE COMMONWEALTH OF KENTUCKY MAY CONSTITUTIONALLY REQUIRE A MARRIED WOMAN TO OBTAIN A MOTOR VEHICLE OPERATOR'S LICENSE IN THE SURNAME OF HER HUSBAND, UNLESS SHE CHANGES HER SURNAME BY A COURT ORDER PURSUANT TO KRS 401.010.

STATEMENT OF THE CASE

Petitioner's statement of the case, though not complete, is substantially correct. Additional material facts and circumstances bearing upon the Fourteenth Amendment issue relied upon by the Petitioner will be set out in the argument which follows:

ARGUMENT

THE COMMONWEALTH OF KENTUCKY MAY CONSTITUTIONALLY REQUIRE A MARRIED WOMAN TO OBTAIN A MOTOR VEHICLE OPERATOR'S LICENSE IN THE SURNAME OF HER HUSBAND, UNLESS SHE CHANGES HER SURNAME BY A COURT ORDER PURSUANT TO KRS 401.010.

Respondent, F. E. Hodges, the Director of the Division of Driver Licensing, of the Department of Transportation of the Commonwealth of Kentucky, has sought to enforce the statutory provision which requires a person to apply for, and receive, a motor vehicle operator's license in the legal and full name of that person, KRS 186.412. Pursuant to said statute, Respondent has instructed all circuit court clerks (those persons directly responsible for issuing the licenses), to ascertain the legal name of the person applying and issue the license of that person in the legal name. In the case of a married woman, it is the belief of Respondent that a married woman, after being united in a ceremony of marriage, takes the surname of the husband. KRS 401.010 makes provisions for a person, including a married woman since 1974, to change her legal name to any name that she may choose, and may thereby, obtain an operator's license in that new name by presenting a certified copy of the court order granting such name change.

Pursuant to KRS 186.412, Respondent has issued oral instructions which require that all operator's licenses issued to married women be in the surname of their husband unless a court order granting a name change is presented to the clerk at the time of the application for, or renewal of, the license. Respondent believes this action to be his legal duty under the common law of Kentucky, its statutory provisions, and the decisions of its courts.

The case of *Pryor v. Thomas*, Ky., 361 S.W. 2d 279 (1962), *cert. denied* 372 U.S. 922 (1963), details a very lengthy account of the beginnings of common law states, and more especially, what the common law of Kentucky was at the time of its statehood. In the *Pryor* case, *supra*, the Court said beginning at page 279:

> "Kentucky is a common law state. Our common law originated as an English institution evolved from local rules and customs which were in time recognized by the King's Court. That great mass of law has been accepted as part of the general law of almost every State of the Union.
>
> By an Act of the Virginia General Assembly of 1776 it was declared 'that the common law of England, all statutes or acts of parliament made in the aid of the common law prior to the fourth year of the reign of King James I, and which are general, and not local to that kingdom...shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of this colony.' (Citation omitted.)
>
> The fourth year of the reign of King James I was in the year 1607. On May 14, 1607, the first permanent English settlement in America was founded on Jamestown Island, in the James River, near the present city of Norfolk, Virginia. Apparently the General Assembly of Virginia considered this event to be an appropriate cut off date.
>
> Section 233 of our Constitution provides:
>
> 'All laws which, on the first day of June, one thousand seven hun-

> dred and ninety two, were in force in the state of Virginia, and which are of a general nature and not local to that state, and not repugnant to this Consitution, nor to the laws which have been enacted by the general assembly of this Commonwealth, shall be in force within this state until they shall be altered or repealed by the general assembly.'

It will be noted that the Act of the General Assembly of Virginia of 1776 accepted generally the common law as developed by the courts, but excluded statutes or acts made before 1607. However, KRS 447.040 has further limited the scope of our acceptance. It reads:

> 'The decisions of the Courts of Great Britian rendered since July 4, 1776, shall not be of binding authority in the courts of Kentucky.'

It has long been accepted by the bench and bar that the common law prevails unless changed by our constitution or statutes..."

Further, the Kentucky Supreme Court noted that,

> "In the absence of a national common law in this country, each state is left to determine the common law for itself, according to its particular needs and policies..."*Adams Bros. v. Clark*, 189 Ky. 279, 224 S.W. 1046, 1047 (1920).

It is further stated at 15A C.J.S., Common Law, § 16, page 73, that:

> "In determining the question as to what is the common law of any particular state regard must be had to its general policy, the usages sanctioned by its courts, and its statutes."

This agrees substantially with the statement found at 15A C.J.S. Common Law, § 10, page 49, which further states that:

> "Common practice has always made common law, and an unbroken custom of a state for more than one hundred years is part of the common law of the state."

These statements certainly support the theory that the common law of any jurisdiction is based upon the customs of that particular jurisdiction, and in the instant case, the particular jurisdiction is the Commonwealth of Kentucky and not Great Britain; nor the common law of any other state of the Union. Although Petitioner cited 19 *Halsbury's Laws of England* 829 (3d Ed., 1957) in reaching her arguments before the Court of Appeals, the quotation states that the practice of a woman adopting her husband's name, even though still done by custom in England, was never and has never been compelled by law. This citation appears to support the theory upon which all common law, and hence the common law of the Commonwealth of Kentucky, is based; and which theory is that the custom of the particular jurisdiction becomes the common law of that jurisdiction. Therefore, through custom, habit, and usage, the common law has developed and requires that upon marriage, the female adopts the surname of her husband upon the performance of the marriage ceremony. Section 27 of Chapter

205 of a legislative act of 1893 stated that:

> "If a wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of her husband as shall be deemed equitable, and be *restored* to the *name* she *bore before marriage* if she desires it." (Kentucky Statute 2122, emphasis added.)

This 1893 statute clearly indicates that it was the custom, and therefore the common law, that a woman upon marriage took the surname of her husband. Further, it will be noted in the case of *Rayburn v. Rayburn*, 300 Ky. 209, 187 S.W. 2d 804 (1945), which stated at page 806, that:

> "...It does not appear that there are any decisions directly involving the matter of granting to the wife a restoration of her maiden name when the husband has been granted a divorce. In the case of *Walden v. Walden*, 250 Ky. 379, 63 S.W. 2d 290, it is stated: While we have no power to reverse the decree of divorce, we may review the evidence for the purpose of determining whether the judgment in other respects was proper.
>
> We are inclined to believe that the restoration of a name may be as readily cared for under the phrase proper in other respects, as in the citation above, as a determination relative to alimony or settlement of property rights."

There are numerous Kentucky cases indicating that the custom, and, therefore, the common law, is that the married woman assumes the husband's surname upon performance of the ceremony of marriage. See *Phillips v. Phillips*, 307 Ky. 217, 210 S.W. 2d 756 (1948), and *Mitts v. Mitts*, 312 Ky.

854, 229 S.W. 2d 958 (1950).

The case of *Gross v. Helton*, Ky., 267 S.W. 2d 67 (1954), concerned the re-registration of married women and held at page 69 that:

> "Five married women who voted in the election were still registered under their maiden names in violation of KRS 117.640(2) which requires re-registration in such cases. Their votes were void for this reason." (KRS 117.640(2) was repealed in 1972 by the Kentucky General Assembly.)

Further, the Kentucky Supreme Court held in the case of *Terrell v. Terrell*, Ky., 352 S.W. 2d 195 (1961) at page 196, that:

> "Appellant urges that the Chancellor erroneously restored her maiden name. KRS 403.060(4) provides:
>
> 'If the wife obtaining a divorce so desires the court shall restore to her the name she bore before marriage.'
>
> Since the appellant did not seek a restoration of her former name we believe that the judgment should be reversed in this respect. Cf. *Rayburn v. Rayburn*, 300 Ky. 209, 187 S.W. 2d 804."

One can further find stated in 57 Am. Jur. 2d, Name, § 9, at page 281 that:

> "It is well settled by common law principles and

> immemorial custom that a woman upon marriage abandons her maiden name and assumes the husband's surname."

Thus, it becomes readily obvious that the common law of Kentucky, like that of Alabama, through custom, immemorial habit, and regular usage, requires that upon the performance of the ceremony of marriage, the woman adopts the surname of the husband as her own surname, and which is the surname for all succeeding offspring of such marriage.

Although such an unyielding rule may well appear unfair to females who are in the position of the Petitioner, that position is not unchangeable, (as is usually the situation in "equal protection" cases). In most of those decisions cited by Petitioner, those persons had no alternative remedies and were faced with economic discrimination, but the Petitioner has an opportunity to avoid this discrimination. In 1974, the General Assembly of the Commonwealth of Kentucky amended KRS 401.010 to allow *all* persons, married or unmarried, male or female, white or non-white, and regardless of their religious affiliation, to petitition the county court of the county in which that person resides and thereby obtain a legal name change, which would allow either name to be changed to any other name that the petitioner may desire. Any time a choice is made, some selection of alternatives must result; but Respondent believes this selection is not of that type recently struck down by this court in its plenary decisions since *Forbush v. Wallace, supra,* was decided.

The Petitioner cites the case of *Green v. Waterford Board of Education*, 473 F. 2d 629, 634 (2d Cir. 1973), and quotes from the case to explain that these

> "Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed."

The Respondent would further point this Court's attention to the fact that the petitioner in that case, Priscilla B. Green, was a pregnant school teacher who had been forced to leave her job, and which unemployment caused a great economic hardship upon all persons in her situation. The *Green* court further stated at page 632:

> "In recent years, the Supreme Court has developed what has been characterized as 'a rigid two-tier attitude' in equal protection cases. In most instances, statutory or regulatory classifications are presumptively constitutional and will not be disturbed *unless they are without rational basis*, resting *'on grounds wholly irrelevant to the achievement' of some permissible state purpose.*" (Citations omitted. Emphasis added.)
> "In other cases, however, where the classification is grounded on certain 'suspect' criteria,...or where the classification impinges upon certain 'fundamental' rights,...'strict' judifical scrutiny is required, and the classification will not stand unless justified by some 'compelling governmental interest.' (Citations omitted.)

Further the court said at pages 632, 633:

> "The Supreme Court, however, has not yet added sex to the list of suspect classifications...we accept arguendo the district court's assumption that *rational basis scrutiny is the appropriate standard of review in this case.*" (Citations omitted. Emphasis added.)

> "(T)he 'essential inquiry' in all equal protection cases is 'inevitably a dual one: What legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?"

Continuing further, the Court quoted from a decision rendered by this Court, 408 U.S. at 95, 92 S. Ct. at 2290:

> "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." (Citations omitted.)

And the *Green* court, *supra*, further quoted from another decision of this Court, 404 U.S. at 76, 92 S. Ct. at 254, on page 633 as follows:

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having *a fair and substantial relation to the object of the legislation...*'." (Citations omitted. Emphasis was the Court's.)

Lastly, the *Green* court, *supra*, stated at page 634 that:

> "An equal protection argument requires careful analysis not only of the effect of the claimed discrimination but also of the degree to which the discriminatory classification furthers legitimate state interests."

Regardless of which test this Court now believes to be the proper basis of scrutiny, Respondent respectfully submits that the instant case does not sound of such a suspect classification as would require this Court to overturn the actions of Respondent. The Petitioner argues this selection is

based on sex as a classification, and that any classification which is based on sex, as well as race, or any other immaterial aspect, is immediately suspect. Respondent, however, respectfully submits that this is not a classification based on sex, but rather is a classification based on marital status, with sex being merely a subclassification of that larger class. Further consideration must be given the view propounded by many persons in the Petitioner's class, that they may now choose not to adopt the proposed equal rights amendment which may cure the present subclassification problem. At the present time, the required three-fourths of the soverign states have not adopted this amendment, and have not agreed to adopt such form of discrimination as an unlawful or a prohibited action. Until such time as the required three-fourths of the states adopt this amendment to the United States Constitution, such classifications and subclassifications may not be prohibited. Certainly there is a valid question as to how many persons in this nation actually believe this common law requirement of the Commonwealth of Kentucky (and the state of Alabama), to be an illegal form of discrimination.

An investigation into the beliefs of each female concerning this issue, whether married or not, would be truly determinative of what is to be discriminatory. An action which is expected, preferred, and relied upon by perhaps as many as eighty-five or even ninety percent of the persons within the class or subclass, and certainly more than one-half of these persons, is not discrimination; but would rather, in fact, be an unjust discrimination to overturn the relative security that this majority relies upon today. This country was founded upon the premise that a majority of the persons concerned with an issue should decide that issue for the entire group, with a sympathetic view to the rights of those persons who remain in the minority. Respondent

respectfully urges this court that the majority has decided this question from its prior two hundred years' history of rejecting any actions other than by adopting the husband's surname upon marriage. This has been done, and should continue to be done for the benefits of the society as a whole, which majority is entitled to equal protection of the laws as well. Those rights of the minority which must be viewed sympathetically by the majority, have been considered, and have been adequately protected by the Commonwealth of Kentucky in the passage of KRS 401.010, which allows those persons denied the equal protection of the laws, by operation of the common law, to change the effect of such law by regular, documented court actions, the cost of which is so small as to be described as nominal, and which returns any person to a class of whatever social status they may so desire.

Lastly, this subclassification of a married woman taking her husband's surname is further necessary for the benefit of succeeding generations, and the stability not only of these children, but for the stability of an ordered society. In order for any civilization to remain intact and stable, it becomes necessary for the combatants to lay down their arms, for all persons to respect the basic rights of humanity, and through laws which are, in fact, two edged swords, acquire further desirable rights at the cost of surrendering the lesser rights of total individuality. Thus, for the benefit of society in enforcing its laws, for the society to be able to lay and collect its taxes, and for society to allow a person to continue their usual transactions of everyday life, there must, of course, be administrative red tape of a very staggering amount. In order to insure that the basic inalienable rights are preserved for all, it becomes necessary to waive some of the lesser included rights, of which, the Petitioner's requested individuality is one. It is the belief of Respondent that such individuality must be sacrificed, temporarily, for the greater benefits to be derived from the accurate record keeping of governments, and the stability of the family unit. There must be some standards applied for keeping accurate records in order to make available valid information which must be relied upon. Social security numbers have become standard, but even they contain certain shortcomings. As an example, a property conveyance from 404-26-8194 to 400-64-8997 would be both novel and confusing to most of us, but this example is not used as an attempt to make light of the seriousness of Petitioner's argument; but rather is being used to demonstrate that record keeping is more reliable when certain standards are adopted and followed, such as requiring a married woman to use her husband's surname, at least until she petitions a county court and changes her name to something else. The validity of the family name is thereby assured, one researching a family name will know how to proceed, and court documents will reflect what this new name came from and will be recorded accordingly in public records. Such a requirement is not an "undue burden" upon Petitioner, when one considers that the alternative is to place the same burden upon all people who did intend to take the name of their husbands, and intended that all of the offspring of such marriage should have the same family name as that of the husband. An adequate remedy rests with the Petitioner by merely complying with the suggestion of KRS 401.010, and restoring her personal name at birth by her own public actions in a civil proceeding, thereby curing any significant disadvantage that may have resulted under the common law. The court may then determine during the proceeding what names should be used by both parties to the marriage, as well as any children which might be born after the marriage, and an eventual court settlement of the family name.

The Respondent, as Director of the Division of Driver

Licensing for the Commonwealth of Kentucky, is not the only administrator who will be faced with serious problems if this rule of law should be changed to allow a woman the freedom of choice of her surname upon marriage, without some constant public records to legally bind her to this decision. Respondent's problems will be minor when considered and compared to those of other governmental agencies. Consider the Kentucky Department for Human Resources, which keeps the records of each person born into the Commonwealth and establishes a family name for that person. KRS 199.570 requires a new birth certificate to be issued upon any adoption which involves a change of name. There is also a marriage license and ceremony certification record kept in the County Court Clerk's office for each new "family" created within the Commonwealth. This is required by KRS 402.020. KRS 401.010 and 401.040 further require the County Court Clerk to record each name change within the Commonwealth, have the record reflect the former name, and what the new legal name shall be from the date of the order granting the change of name. Furthermore, it is written in 57 Am. Jur. 2d, Name, § 11, page 282, that:

> "...The statutory method of changing one's name has distinct advantages: it is speedy and definite, and *provides a record by which the change of name is definitely and specifically established* and easily proved even after the death of all contemporaneous witnesses." (Emphasis added.)

Thus, one can readily observe that the logical approach for the Petitioner would be to pursue her state remedies by proceeding pursuant to KRS 401.010 and thereby providing an adequate record of such change for posterity. As to the nominal fees involved, the alternative costs of newspaper publication, and other means of creating a similar exposure would be just as

expensive, if not even more expensive. A very early case, *Isaac Rodley's Adm'r. v. Jack Morris*, 6 Ky. Opinions 151, 152 (1872), had this to say as regards public records:

> "The *interests of individuals*, as well as *the whole public, requires* that *public records should never be altered, or their veracity questioned* unless the power as well as the right to alter or amend is clearly shown." (Emphasis added.)

The marriage certificate, which indicates that the Petitioner and her husband were wed, does not indicate in what name they were joined, but only indicates that they were united in marriage. The phrase "united in marriage" seems to leave one with the impression that any married couple generally is of one common name; but because of custom, habit, and usage, that name has always been the surname of the husband. It appears for purposes of legality that another public record must necessarily be produced indicating that this fact is not so. All persons are now identified by a nine digit social security numbering system, and for all practical purposes, this has become a person's true identifier; but just as in the deed examples, one cannot correspond with another merely by using that nine digit number (which cannot be changed even after marriage.) Thus names are used because they are not as complex or impersonal. Respondent only requests that all persons who wish to change their names after marriage, do so in a legally and practical manner, which will assist all persons in guaranteeing to every other person those contractual rights due them by any society.

In the interest of the continuity and systematic record keeping, it is submitted that it is much more realistic, in view of custom and practice, to maintain the status quo and require the continued use of the husband's surname upon marriage, and to pursue the avenue of the court proceeding thereafter, for any further changes of the surname.

CONCLUSIONS

For the reasons stated herein above, it is submitted that the United States Court of Appeals for the Sixth Circuit was correct in its interpretations of the Kentucky common law, that the ruling of that Court was correct as to the questions raised by Petitioner, that the Petitioner has failed to establish any circumstances which would require certiorari to be granted in this case and, therefore, certiorari should be denied.

Respectfully submitted,

JAMES M. RINGO
Assistant Attorney General

GARY L. DAILEY
Counsel for Respondent

FRANKFORT, KENTUCKY 40601

PROOF OF SERVICE

I, JAMES M. RINGO, one of counsel for the Respondent, hereby certify that the foregoing Brief was served on the Petitioner, by depositing three copies of same in the United States mail, first class postage prepaid, on November 17th, 1976, addressed to all Counsel of Record for the Petitioner.

James M. Ringo

JAMES M. RINGO
Assistant Attorney General
Commonwealth of Kentucky